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OFFICE OF PETITIONS

In re Application of
Robert L. Howald et al.
Application No. 09/873,160
Filed: June 1, 2001
Attorney Docket Number: D2370

ON PETITION

This is a decision on the petition filed October 3, 2006, to withdraw the holding of abandonment under 37 CFR 1.181, in accordance with the reasoning of the decision in Delgar Inc. v. Schuyler, 172 USPQ 513.

The petition under 37 CFR 1.181 is **DISMISSED**.

The file record discloses that the Office Action mailed March 10, 2005 was mailed to what was believed to be the address of record. However, petitioner contends that it was not received as it was mailed to an incorrect address and thus returned by the United States Postal Services (USPS). Petitioner further argues that despite the filing of a Notice of Customer Number Record Change on September 24, 2001, prior to the mailing of the Office Action on March 10, 2005, the Office Action was mailed to an incorrect address. In support of their contention of non-receipt, petitioner shows evidence of the Notice of Customer Number Record Change filed September 24, 2001.

Petitioners are advised that while a Notice of Customer Number Record Change was filed September 24, 2001 changing the address for customer number 27774, the instant application was never associated with that or any other customer number on filing June 1, 2001. The address of record provided on the oath or declaration did not include a customer number and therefore, the Notice of Customer Number Record Change on September 24, 2001 was properly mailed. Petitioners are correct that customer number 27774 was provided on the application transmittal however, bibliographic data is taken from either the oath or declaration or Application Data Sheet (ADS), not the application transmittal. Thus the failure to respond to the office action based on a claim of non-receipt is not due to USPTO error but instead appears to be due to the applicants not properly associating the instant application with a customer number, specifically customer number 27774.

In the absence of petitioner showing that they acted responsibly with respect to

providing the USPTO with a proper address, the showing of record is therefore insufficient to warrant withdrawal of the holding of abandonment.

ALTERNATIVE VENUES

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(a)¹ or 37 CFR 1.137(b),² which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was

¹A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

²Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

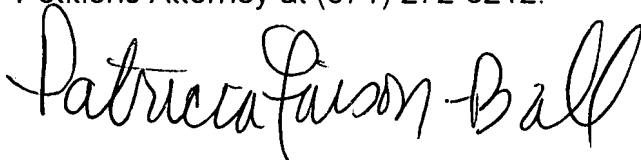
unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (571) 273-8300

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in cursive script, reading "Patricia Faison-Ball". The signature is written in black ink and is positioned above the printed name and title.

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions